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# MEMO ENDORSED

October 15, 2007

## VIA FEDERAL EXPRESS

The Honorable P. Kevin Castel  
 United States District Judge  
 United States Courthouse  
 500 Pearl Street, Room 2260  
 New York, New York 10007-1312

Re: *Riverkeeper, Inc., et al. v. EPA*, 06 Civ. 12987 (PKC)

Dear Judge Castel:

I am the lead counsel for the plaintiffs in the above-entitled matter, and am writing regarding the briefing schedule for the motion to stay filed in this case by respondent U.S. Environmental Protection Agency (“EPA”) on October 10, 2007. In addition, I wish to briefly inform the Court of plaintiffs’ position regarding this Court’s September 28, 2007 *sua sponte* certification of the jurisdictional question to the Second Circuit, about which EPA wrote to the Court on October 12, 2007.

First, with respect to the briefing schedule, plaintiffs hereby request an extension of time until October 31, 2007 to file our opposition to EPA’s motion. Plaintiffs’ counsel has a significant workload over the next two weeks, including meeting pre-existing deadlines in other cases, that would make it very difficult for us to complete the opposition before that date. Counsel for the other parties, EPA and the intervenor, Cooling Water Intake Structure Coalition (“CWISC”), have authorized me to represent to the Court that they consent to plaintiffs’ extension request. Further, counsel for CWISC, Russell Frye, has asked me to request that CWISC be granted the same extension, until October 31, 2007, for its response to EPA’s motion. Plaintiffs have no objection to granting CWISC an extension, but wish to note that if CWISC’s response raises any new arguments in favor of a stay, that plaintiffs will not have had any opportunity to respond to such arguments, and, in such event, plaintiffs may ask this Court for an opportunity to respond.<sup>1</sup> Counsel for EPA, Wendy Waszmer, has asked me to request that EPA be permitted until November 9, 2007 to file its reply brief. Plaintiffs consent to EPA’s request.

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<sup>1</sup> When briefing EPA’s motion to dismiss earlier this year, CWISC’s filing deadline was earlier than plaintiffs’ deadline in order to allow plaintiffs to respond to all of the arguments in support of the motion at one time.

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Second, plaintiffs agree with the Court that certification of the jurisdictional question for interlocutory appeal is appropriate and warranted because, plaintiffs respectfully submit, timely resolution of this question by the Second Circuit (and a stay of the Fifth Circuit case) would eliminate the untoward possibility of a conflicting decision on jurisdiction between federal courts, whereas a stay of this case would not eliminate that possibility. Plaintiffs will therefore oppose EPA's motion for a stay in this case and, as noted in our October 2, 2007 letter to this Court, we will also file a motion to stay in the Fifth Circuit case. Nevertheless, and notwithstanding the parties' differing perspectives on how to proceed, we understand that EPA could not obtain the necessary approvals to appeal during the 10-day period, and we therefore do not object in principle to EPA requesting that the Court re-certify the jurisdictional question after the expiration of the initial 10-day period to file an interlocutory appeal. Plaintiffs would present the certified issue to the Second Circuit themselves, if they could; however, as we understand the governing law, appeals can only be filed by aggrieved parties, and plaintiffs are not aggrieved by this Court's determination that it has jurisdiction over their claims.

Thank you for your consideration of these matters. We respectfully request that this letter be docketed and included as part of the record in this case.

Sincerely,

RWS/sk

Reed Super  
Counsel for Plaintiffs

cc (by Federal Express):

Wendy H. Waszmer, Assistant US Attorney, Counsel for Defendants  
Russell S. Frye, Counsel for Intervenors

Opposition papers  
due October 31 due  
Reply of agg'ns  
Number 9.  
SO 02022007 USOT  
10-16-07